93-183

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

In re DAVID PARKER, *Petitioner*

PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION TO THE HONORABLE JUDGE CAROLYN KING, HONORABLE JUDGE PATRICK HIGGINBOTHAM AND HONORABLE HAROLD DeMOSS, JR., JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT NEW ORLEANS, LOUISIANA

David Parker, Esquire, *Petitioner*
5747 Westcreek Drive
Fort Worth, Texas 76133
(817) 370-8299
Pro Se

I

QUESTIONS PRESENTED

1. Does a court of appeals panel have jurisdiction to limit, or prohibit, a litigant from seeking relief in the Supreme Court of the United States?

2. Is a court of appeals panel empowered to enjoin a party from filing a motion for rehearing and en banc request and order the clerk of the court to refuse to accept the filing of same?

3. Does a court of appeals have jurisdiction to issue an injunction which, inter alia, forbids a party "from taking any action or filing any pleadings concerning any matter or issue of any nature arising from or connected with the litigation or causes of action heretofore asserted or existing" between the parties when there is no final or otherwise appealable decision of the district court?

4. Is it permissible for an appellate court to limit a litigant's access to the courts through an original injunction without articulating a standard, or making findings, sufficient for higher court review as to the exact reasons for such injunction?

5. Without articulating a standard, or making findings of fact, is it permissible for an appellate court to enjoin a litigant from utilizing the rights and remedies granted by the Constitution, Congress and Federal Rules of Court?

LIST OF PARTIES

The parties to the proceedings below were:

Petitioners

Richard W. Pickens

Texas Extrusion Corporation

Pickens Industries, Inc.

Respondent

Lockheed Corporation

Affiliates

Lockheed Finance Corporation

Lockheed California Corporation

TABLE OF CONTENTS

QUESTIONS PRESENTED I

LIST OF PARTIES II

TABLE OF CONTENTS III

INDEX TO APPENDIX VII

TABLE OF AUTHORITIES VIII

ABBREVIATIONS XIII

I. JURISDICTIONAL STATEMENT 1

II. CONSTITUTIONAL PROVISIONS AND STATUTES 1

III. STATEMENT OF CASE 1

IV. ARGUMENT 3

A. The Grant of a Writ of Mandamus or Prohibition Will Aid the Supreme Court's Appellate Jurisdiction 3

1. The Grant of Mandamus Removing the Injunction Will Protect the Constitutional Role of the Supreme Court as Superior to all Other Federal Courts, Enforce the Supreme Court's Jurisdiction and Vindicate Mr. Pickens' Constitutionally Protected Right of Access to the Courts. 3

2. The Grant of Mandamus Will Aid the Supreme Court's Appellate Jurisdiction, as the Ultimate Supervisor of Inferior Federal Courts, Through Ensuring a Circuit is not Arbitrarily Denied the Opportunity to Review a Decision En Banc as the Result of a Usurpation of Judicial Power by a Circuit Court Panel. 7

3. Proper Appellate Review of This Cause Can Not Be Conducted Because the Court of Appeals Failed to Make Findings of Fact In Support of the Original Injunction. The Grant of a Writ of Mandamus Will, Accordingly, Aid the Supreme Court's Appellate Jurisdiction. 11

B. There are Exceptional Circumstances Warranting the Exercise of the Supreme Court's Discretionary Power. 15

1. The Appellate Court's Decision Establishes Authority That a Federal Court of Appeals May Enjoin a Litigant From Petitioning the Supreme Court. 15

2. The Fifth Circuit Panel's Injunction Forbidding the Use of Procedures and Rights Granted by 28 U.S.C. § 46(c) and Rule 35 of the Federal Rules of Appellate Procedure is a Usurpation of Judicial Power and Clear Abuse of Discretion Creating Exceptional Circumstances Warranting the Exercise of the Supreme Court's Discretionary Powers. 18

3. The Court of Appeals Clearly Abused its Discretion in Failing to Make Findings and Conclusions in Support of the Injunction. Such Failure Defeats Proper Appellate Review and Warrants the Exercise of the Supreme Court's Discretionary Powers. 20

C. Adequate Relief Can Not be Obtained in any Other Form or From Any Other Court. 25

1. The Injunction, Issued by the Court of Appeals, Forbids a Motion for Re-Hearing or Rehearing En Banc and the Clerk for the Fifth Circuit is Ordered Not to File Such Motion. Accordingly, Adequate Relief Can Not be Obtained in Any Other Form or From Any Other Court. 25

2. The Injunction Violates 28 U.S.C. § 46(c) Through Denying the Fifth Circuit the Means to Convene En Banc. Writ of Mandamus is the Only Adequate Remedy and Due to the Injunction, The Supreme Court of the United States is the Only Court Which May Grant Relief. 26

3. The Injunction Against Proceeding to this Court is an Unconstitutional Violation of Mr. Pickens' Right of Access to the Courts. However, a Writ of Certiorari Can Not be Filed Without Exposing Petitioner's Client to a Finding of Contempt Leading to Possible Loss of Liberty and Property. The Only Adequate Relief Available, to Properly Protect Petitioner's Client is

by Writ of Mandamus to the Supreme Court of the United States. 27

D. Petitioner Has Standing to Bring the Instant Writ of Mandamus. 28

PRAYER 29

INDEX TO APPENDIX

FIFTH CIRCUIT OPINION AND INJUNCTION 1a

DISTRICT COURT OPINION 4a

HOLLOWAY V. NAVARRO 9a

THE CONSTITUTION OF THE UNITED STATES
(Article III) 13a

UNITED STATES STATUTES 15a
28 U.S.C. § 1651
28 U.S.C. § 46

FEDERAL RULES OF CIVIL PROCEDURE 17a
Rule 1
Rule 52(a)
Rule 65(d)

FEDERAL RULES OF APPELLATE PROCEDURE,
LOCAL RULES AND INTERNAL OPERATING
PROCEDURES OF THE FIFTH CIRCUIT 19a
FRAP 35
Local Rule 35
Local Rule 47.5 and I.O.P.'s

TABLE OF AUTHORITIES
CASES

Aiken v. Q.L. Investment Inc., 959 F.2d 521 (5th Circ. 1992) 22
Alberti v. Cruise, 383 F.2d 268 (4th Cir. 1967) 12
Alexander v. Chevron, 806 F.2d 526 (5th Circ. 1986) 9
Associate Data Processing Service Corporations v. Camp, 397 U.S. 150 (1970) 29
Autry v. Estelle, 706 F.2d 1394 (5th cir. 1983) 9
Barlow v. Collins, 397 U.S. 159 (1970) 29
Barrett v. United States, 798 F.2d 565 (2nd Cir. 1986) 4
Bounds v. Smith, 430 U.S. 817 (1977) 16
Bros Incorporated v. W.E. Grace Manufacturing Company, 320 F.2d 594 (5th Cir. 1963) 23
Broussard v. Southern Pac. Transp. Co., 665 F.2d 1387 (Former 5th Cir. 1982) (en banc) 9
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 4
Cavett v. Ellis, 578 F.2d 567 (5th Cir. 1978) 9
Chambers v. Baltimore & Ohio R.R. Co., 207 U.S. 142 (1907) 4,16,24
Coastal States Marketing Inc. v. Hunt, 694 F.2d 1358 (5th Cir. 1983) 4
Covington & Cincinnati Bridge Co. v. Hager, 203 U.S. 109 (1906) 6
DeLong v. Hennessey, 912 F.2d 1144 (9th Cir. 1990) 12,13,24
Doe v. Bolton, 410 U.S. 179 (1973) 29
Exhibitors Poster Exchange, Inc. v. National Screen Service Corporation, 543 F.2d 1106 (5th Cir. 1976) 7,8,9,10,11
Ex Parte Burtis, 103 U.S. 238 (1881) 19
Ex parte Harley-Davidson Motor Co., 259 U.S. 414 (1922) 19,21
Ex parte Parker, 120 U.S. 737 (1887) 19
Garland v. Polley, 594 F.2d 1220 (8th Cir. 1979) 5
Green v. Carlson, 649 F.2d 285 (5th Cir. 1981) 8,10

Green v. Warden, U.S. Penitentiary, 699 F.2d 364 (7th Cir. 1983) 6,8
Hall v. Sutton, 755 F.2d 786 (11th Cir. 1985) 5
Harrison v. Springdale Water & Sewer Com'n., 780 F.2d 1422 (8th Cir. 1986) 4
Hazel-Atlas Co. v. Hartford Co., 322 U.S. 238 (1944) 30
H. Prang Trucking Co. v. Local Union No. 469, 613 F.2d 1235 (3rd Cir. 1980) 25
Holloway v. Navarro, Appeal No. 91-1541 (5th Cir. 1992) (unpublished) 8,9,17
Hook v. Hook & Ackerman, Inc., 213 F.2d 122 (3rd Cir. 1954) 12
Howard v. Gonzales, 658 F.2d 352 (5th Cir. Unit A 1981) 9
In re Martin-Trigona, 737 F.2d 1254 (2nd Cir. 1984) . . . 4,24
In re Oliver, 682 F.2d 443 (3rd Cir. 1982) 12
In re Powell, 851 F.2d 427 (D.C. Cir. 1988) . 12,13,14,22,24
Jackson v. Procunier, 789 F.2d 307 (5th Cir. 1986) . . 4,6,17
Jordon v. Gilligan, 500 F.2d 701 (6th Cir. 1974) 23
Kerr v. United States Dist. Court for Northern Dist., 426 U.S. 394 (1976) 19
LaBuy v. Howes Leather Co., 352 U.S. 249 (1957) 19
Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701 (1927) 19
Manning v. M/V "Sea Road", 417 F.2d 603 (5th Cir. 1969) 9
Matter of Hartford Textile Corp., 681 F.2d 895 (2nd Cir. 1982) 4,8
Matzker v. Hern, 748 F.2d 1142 (7th Cir. 1984) 5
Marbury v. Madison, 5 U.S. (1 Branch) 137 (1803) 5
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 5
McCullough v. Cosgrave, 309 U.S. 634 (1940) 19

McKay v. Hammock, 730 F.2d 1367 (10th Cir. 1984) 4
Miller v. Meinhard-Commercial Corporation,
462 F.2d 358 (5th Cir. 1972) 23
Mitchum v. Purvis, 650 F.2d 647 (5th Cir. 1981) 4,12
Morrissey v. Brewer, 408 U.S. 471 (1972) 13,24
Mullen v. Household Bank-Federal Sav. Bank,
867 F.2d 586 (10th Cir. 1989) 8
Plum Creek Lumber Co. v. Hutton,
608 F.2d 1283 (9th Cir. 1979) 6
Pickens v. Lockheed, 990 F.2d 1488 (5th Cir. 1993) 2
Pritchard v. Norton, 16 Otto 124, 106 U.S.
124 (1882) 4
Professional Plan Examiners of N.J. v. Lefante,
750 F.2d 282 (3rd Cir. 1984) 25
Pruitt v. Levi Strauss & Co., 932 F.2d 458
(5th Cir. 1991) 9
Re Metropolitan Trust Co., 218 U.S. 312 (1910) 19
Root Refining Co. v. Universal Oil Products Co.,
169 F.2d 514 (3rd Cir. 1948) 30
Ruderer v. United States, 462 F.2d 897
(8th Cir. 1972) 14
Rudolph v. Locke, 594 F.2d 1067
(5th Cir. 1979) 4
Ryland v. Shapiro, 708 F.2d 967
(5th Cir. 1983) 4
Samaad v. City of Dallas, 922 F.2d 216
(5th Cir. 1991) 9
Sanders v. St. Louis, 724 F.2d 665
(8th Cir. 1983) 5
Schlagenhauf v. Holder, 379 U.S. 104 (1964) 19,21
Schmidt v. Lessard, 414 U.S. 473 (1974) 4,21
Singleton v. Wulff, 428 U.S. 106 (1976) 29
Sires v. Gabriel, 748 F.2d 49 (1st Cir. 1984) 24
Southmark Properties v. Charles House Corp.,
742 F.2d 862 (5th Cir. 1984) 23
Stern v. South Chester Tube Co., 390 U.S.
606 (1968) 6
Telecommunications Research & Action v. F.C.C.,
750 F.2d 70 (D.C. Cir. 1984) 6

Thomas v. Capital Sec. Services Inc., 836 F.2d 866 (5th Cir. 1988) (en banc) 22
Thomas v. Collins, 323 U.S. 516 (1945) 25
Tripati v. Beaman, 878 F.2d 351 (10th Cir. 1989) 14,22
United Mine Workers v. Illinois Bar Association, 389 U.S. 217 (1967) 24
United States v. Chanya, 700 F.2d 192 (5th Cir. 1983) 9
United States Department of Labor v. Triplett, 494 U.S. 715 (1990) 29
United States v. Don B. Hart Equity Pure Trust, 818 F.2d 1246 (5th Cir. 1987) 9
Universal Oil Co. v. Root Rfg. Co., 328 U.S. 575 (1946) 30
Urban v. United Nations, 768 F.2d 1497 (D.C. Cir. 1985) 8
White v. Carlucci, 862 F.2d 1209 (5th Cir. 1989) 25
Wilson v. Thompson, 593 F.2d 1375 (5th Cir. 1979) 4
Wolfe v. McDonnell, 418 U.S. 539 (1974) 4
Wooten v. Bomar, 266 F.2d 27 (6th Cir. 1959) 8
Young v. Biggers, 816 F.2d 216 (5th Cir. 1987) 9

THE CONSTITUTION OF THE UNITED STATES

(Article III) 5,6,16

UNITED STATES STATUTES

28 U.S.C. § 46 1,18,19,20,26,27
28 U.S.C. § 1254 1
28 U.S.C. § 1291 1,2
28 U.S.C. § 1651 1,6,21

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 35 18,19
Rule 47.5 9,10

FEDERAL RULES OF CIVIL PROCEDURE

Rule 1 12
Rule 12(b) 1
Rule 52(a) 12,13,23
Rule 60(b) 1,14,15,22,23
Rule 65(d) 12,13,23

TEXTS

5A. J.Moore, *Federal Practice* ¶ 52.06[2] at 52-153 25
4 J.Moore, *Federal Practice* ¶ 52.07 (2nd ed. 1966) (1966 Supp.)
Now, see 5A. J. Moore *Federal Practice*
¶ 52.07 at 52-151 12
7 J.Moore, *Federal Practice* ¶ 65.11 4
11 C. Wright & A. Miller, *Federal Practice and Procedure,*
¶ 2955 4

ABBREVIATIONS

All references to Mr. Pickens include Texas Extrusion Corporation (TEC) and Pickens Industries, Inc. (PII) except where stated otherwise.

All references to Lockheed or Lockheed Corporation include Lockheed Finance Corporation and Lockheed California Company.

All references to the Appendix, attached hereto, are designated App. with the corresponding page number of the cited material.

All references to the Record of lower court proceedings, and not included in the Appendix, are designated as R. with a corresponding document description and original page number of the document.

I. JURISDICTIONAL STATEMENT

The Supreme Court is granted jurisdiction of this cause pursuant to 28 U.S.C. § 1254 (As amended June 27, 1988), Pub.L. 100-352 § 2(a), (b), 102 Stat. 662) and 28 U.S.C. § 1651 (All Writs Act). The cause was appealed from a final decision of a district court of the United States and the Court of Appeals for the Fifth Circuit was granted jurisdiction pursuant to 28 U.S.C. § 1291 (As amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.).

II. CONSTITUTIONAL PROVISIONS AND STATUTES

A. The Constitution of the United States Article (III) at page 13a of Appendix.
B. 28 U.S.C. § 1651(a) at page 15a of Appendix
C. 28 U.S.C. § 46 at page 15a of Appendix.

III. STATEMENT OF CASE

On February 14, 1992 Mr. Pickens filed a complaint in the United States District Court for the Northern District of Texas, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, seeking to set aside two prior judgments. Mr. Pickens' allegations centered on extensive fraud on the court committed by officers of the court. On March 12, 1992 Lockheed moved to dismiss pursuant to Rule 12(b)(6). Lockheed did not deny the allegations contained in Mr. Pickens' complaint. On March 31, 1992 all discovery was stayed. On August 4, 1992 the district court granted Lockheed's Rule 12(b)(6) motion and dismissed Mr.

Pickens' complaint. On August 14, 1992 Mr. Pickens moved to vacate the district court judgment and to amend his complaint. On August 17, 1992 the district court denied Mr. Pickens' motion for leave to amend and to vacate judgment. Thereafter, on September 1, 1992, appeal was perfected to the Fifth Circuit Court of Appeals pursuant to the jurisdiction granted by 28 U.S.C. § 1291. Oral arguments were heard on May 5, 1993, before Judge Carolyn King, Judge Patrick Higginbotham and Judge Harold DeMoss, Jr.. The Honorable Panel rendered its opinion on May 21, 1993 and affirmed the trial court. In addition, the court entered an *original* injunction forbidding Mr. Pickens from taking any further action on the lawsuit or claims related thereto.

Lockheed did not obtain a ruling granting or denying injunctive relief in the district court. Nor did Lockheed appeal any act, failure to act or any other issue pertaining to injunctive relief. Lockheed sought *original* injunctive relief with the court of appeals through the argument presented in its brief.

Counsel of record, David Parker, Esquire, pro se, brought the instant petition for writ of mandamus or prohibition seeking to vacate the decision and *original* injunction entered May 21, 1993.

The opinion of the Court of Appeals for the Fifth Circuit, dated May 21, 1993, is reported at 990 F.2d 1488 (5th Cir. 1993) and is reprinted in the appendix hereto, p. 1a *infra*. The memorandum decision of the United States District Court for the

Northern District of Texas (Fish, A.J.) is reprinted in the appendix hereto, p. 4a *infra*.[1]

IV. ARGUMENT

A. The Grant of a Writ of Mandamus or Prohibition Will Aid the Supreme Court's Appellate Jurisdiction

1. The Grant of Mandamus Removing the Injunction Will Protect the Constitutional Role of the Supreme Court as Superior to all Other Federal Courts, Enforce the Supreme Court's Jurisdiction and Vindicate Mr. Pickens' Constitutionally Protected Right of Access to the Courts.

The appellate court's original injunction forbids Mr. Pickens "... from taking any action or filing any pleadings concerning any matter or issue of any nature arising from or connected with the litigation or causes of action heretofore asserted or existing ..." (App. 1a). Literally read, the filing of any petition, writ or other action before the Supreme Court is a violation of the injunction.[2]

---

1. The district court opinion did not accurately restate the fraud on the court allegations. *Compare*, App. 6a, 7a with R.1 (Plaintiffs' Independent Action). Plaintiff alleged ex parte contact other than that reviewed on the original appeal (which was much more egregious), fraud by officers of the court, egregious conflicts of interest and conniving by counsel for TEC (the trustee's lawfirm) with Lockheed counsel to defeat TEC. Other instances of misconduct were alleged. The petition was supported with over 100 exhibits and expert opinion.

2. Any allusion that the injunction does not attempt to prohibit petitioning the Supreme Court would seem to be in fatal conflict with standards of construction. It is fundamental that injunctive orders must be "designed to prevent uncertainty and (continued...)

That is, the express terms of the injunction forbid "taking any action" or "filing any pleading". Filing a petition for writ of certiorari to this Court is both "taking action" and "filing a pleading". The injunction either specifically forbids, or unconstitutionally "chills", Mr. Pickens' right of access to the courts[3] through enjoining his right to petition this Court.[4]

---

[2](...continued)
confusion on the part of those faced with injunctive orders..." *Schmidt v. Lessard*, 414 U.S. 473, 476, (1974) (cites omitted). *See generally* 7 J. Moore, *Federal Practice* ¶ 65.11; 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2955. To view the injunction as not prohibiting petitioning to the Supreme Court would read uncertainty and confusion into the injunction since a literal reading demands the opposite conclusion. Especially so, where other courts, faced with issuing similar injunctions, specifically reserved the right to proceed to a higher court. *See In Re Martin-Trigona*, 737 F.2d 1254, 1264 (2nd Cir. 1984); *Matter of Hartford Textile Corp.*, 681 F.2d 895, 897 (2nd Cir. 1982). Regardless, the appellate court's injunction is a clear "chill" to the exercise of the right of access to the courts.

3. "The right of access to the courts is constitutionally protected." *McKay v. Hammock*, 730 F.2d 1367, 1375 (10th Cir. 1984). "Access to the courts is a fundamental right of every citizen". *Harrison v. Springdale Water & Sewer Com'n.*, 780 F.2d 1422, 1427 (8th Cir. 1986); *See also, Jackson v. Procunier*, 789 F.2d 307, 311 (5th Cir. 1986), *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983) (citing *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907)). The right of access to the courts is said to spring from a number of different Constitutional sources. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 612 (1972) (first amendment). *See also Wilson v. Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979); *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1363 (5th Cir. 1983). Both procedural and substantive due process are said to guarantee the right of access to the courts. *Wolfe v. McDonnell*, 418 U.S 539, 556-558, (1974); *Mitchum v. Purvis*, 650 F.2d 647, 648 (5th Cir. 1981); *Rudolph V. Locke*, 594 F.2d 1076, 1078 (5th Cir. 1979); *Jackson v. Procunier*, 789 F.2d 307, 310 (5th Cir. 1986) (The right of access to the courts is also protected under Article 4 of the Constitution) *See Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983) (citing *Chambers v. Baltimore & Ohio Railroad, supra*, 207 U.S. at 148).

4. "Constitution protects causes of action from arbitrary interference", *Barrett v. United States*, 798 F.2d 565, 575 (2nd Cir. 1986) (citing *Pritchard v. Norton*, 16 Otto 124, 106 U.S. 124, 132 (1882)). The right of access to the courts may not be improperly intimidated or chilled. *Harrison v. Springdale Water &*
(continued...)

The injunction, through its language denying Mr. Pickens the right to petition this Court, is an assertion of superiority over the Supreme Court, Congress and the Constitution. That is, the Constitution of the United States[5], decisions of the Supreme Court of the United States[6] and regulations made by Congress[7] are the *only* sources empowered to define the Supreme Court's jurisdiction. By definition, any inferior court[8] which attempts to deny the Supreme Court's power to hear a case or controversy is asserting superiority over the Constitution[9], the Supreme

---

[4](...continued)
Sewage Com'n, 780 F.2d 1422, 1428, (8th Cir. 1986) (citing *Sanders v. St. Louis*, 724 F.2d 665, 666 (8th Cir. 1983); *Garland v. Polley*, 594 F.2d 1220, 1223 (8th Cir. 1979); *Hall v. Sutton*, 755 F.2d 786, 787 (11th Cir. 1985); *Matzker v. Hern*, 748 F.2d 1142, 1150-51 (7th Cir. 1984)).

5. U.S. Const. art. III § 2

6. *Marbury v. Madison*, 5 U.S. (1 Branch) 137 (1803); *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

7. U.S. Const. art. III § 2.

8. The court of appeals is an inferior court created by Congress pursuant to article III, section 1, of the Constitution. Section 1, of Article III, states "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

9. The court of appeals asserts superiority over the Constitution because the injunction expands the court's jurisdictional power to deny petitioning to the Supreme Court. Such power is not granted by the Constitution.

Court[10] and Congress[11]. Accordingly, the injunction is unconstitutional per se and mandamus should issue[12].

Constitutional considerations aside, the All Writs Act, 28 U.S.C. § 1651(a), is not an independent grant of jurisdiction[13] and does not enlarge jurisdiction[14]. Accordingly, the court of appeals is without statutory jurisdiction to enjoin petitioning to the Supreme Court. The court of appeals' equitable, or supervisory, powers do not, it would seem, extend to enjoining petitioning to a higher court, since the court of appeals has no supervisory power over the Supreme Court. Accordingly, the grant of a writ of mandamus, to remove the injunction, will protect the constitutional role of the Supreme Court as superior to all other federal courts, enforce the Supreme Court's jurisdiction and vindicate

---

10. The court of appeals asserts superiority over the Supreme Court because the injunction exercises the power to limit the cases or controversies the Supreme Court may hear. Such a right is not granted by either the Constitution or any decision of the Supreme Court.

11. The court of appeals asserts superiority over Congress because the injunction exercises the power to define jurisdiction exclusively reserved by the Constitution (Article III) to Congress.

12. *Jackson v. Procunier*, 789 F.2d 307, 311 (5th Cir. 1986) (a deliberate denial of the right of access to the courts to pursue a civil appeal is a deprivation of a substantive constitutional right found in the first amendment, as well as the potential deprivation of substantive and procedural due process).

13. "The All Writs Act is not an independent grant of jurisdiction to a court ..."*Telecommunications Research & Action v. F.C.C.*, 750 F.2d 70, 77 (D.C. Cir. 1984) (citing *Stern v. South Chester Tube Co.*, 390 U.S. 606, 608 (1968); *Covington & Cincinnati Bridge Co. v. Hager*, 203 U.S. 109, 110 (1906)).

14. *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 367 (7th Cir. 1983); *Plum Creek Lumber Co. v. Hutton*, 608 F.2d 1283, 1289 (9th Cir. 1979).

Mr. Pickens' constitutionally protected right of access to the courts.

2. The Grant of Mandamus Will Aid the Supreme Court's Appellate Jurisdiction, as the Ultimate Supervisor of Inferior Federal Courts, Through Ensuring a Circuit is not Arbitrarily Denied the Opportunity to Review a Decision En Banc as the Result of a Usurpation of Judicial Power by a Circuit Court Panel.

The panel decision specifically forbids Mr. Pickens from filing a motion for rehearing or for en banc consideration (App. 2a,3a). Further, the clerk of the court is ordered not to accept for filing any motion for rehearing or en banc consideration without the express approval of a judge of the court (App. 2a,3a). Mr. Pickens can not seek the express approval of a judge of the court to file a motion for rehearing or en banc consideration because he is forbidden to take any action concerning any matter or issue of any nature arising from or connected with the litigation (App. 2a). Accordingly, it is impossible for Mr. Pickens to seek en banc review of the panel's decision.

The ability to petition the court for en banc review is important because the decision of the panel conflicts with an earlier decision of the Fifth Circuit[15]. The various circuits which have reviewed the issue of whether an appellate court may

---

15. *Exhibitors Poster Exchange, Inc. v. National Screen Service Corporation*, 543 F.2d 1106 (5th Cir. 1976).

issue an original injunction are in conflict[16]. In the instant case, Lockheed like the appellee in *Exhibitors Poster Exchange Inc. v. National Screen Service Corporation*, 543 F.2d 1106 (5th Cir. 1976) sought an original injunction from the court of appeals. Lockheed sought an injunction through argument presented in its brief[17]. Lockheed admitted the apparent conflict of its request with the decision in *Exhibitors Poster Exchange*. However, Lockheed argued *Holloway v. Navarro*[18] and *Green v. Carlson*[19] had not followed *Exhibitors Poster Exchange*.

It is worthwhile to review the Fifth Circuit cases to demonstrate that *Exhibitors Poster Exchange* remains a live decision not de facto overruled. If *Exhibitors Poster Exchange* remains as

---

16. Circuits denying or limiting their jurisdiction to issue an original injunction: *Mullen v. Household Bank - Federal Sav. Bank*, 867 F.2d 586, 588 (10th Cir. 1989); *Wooten v. Bomar*, 266 F.2d 27, 28 (6th Cir. 1959).

Circuits claiming jurisdiction to issue an original injunction: *Matter of Hartford Textile Corp.*681 F.2d 895, 897 (2nd Cir. 1982); *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 368 (7th Cir. 1983); *Urban v. United Nations*, 768 F.2d 1497, 1500 (D.C. Cir. 1985).

Circuits in conflict: *Exhibitors Poster Exchange Inc. v. National Screen Service Corporation*, 543 F.2d 1106, 1107 (5th Cir. 1976) *but, see Holloway v. Navarro*, Appeal No. 91-1541 (5th Cir. 1992) (unpublished) (App. at 9a).

17. Lockheed's Opening Brief at page 31, note 26 states as follows: "This Court did refuse to impose an original injunction in *Exhibitors Poster Exchange*, *supra*, stating that there was no appealable decision of the district court and the injunction was not in furtherance of this Court's jurisdiction. In *Holloway v. Navarro* and *Green v. Carlson*, however, original injunctions were entered by this Court. Any conflict on this issue, therefore, should be resolved in favor of the more recent cases and the injunction should issue."

18. *Holloway v. Navarro*, Appeal No. 91-1541 (5th Cir. 1992) (unpublished) (App. 9a).

19. 649 F.2d 285 (5th Cir. 1981)

valid precedent for the Fifth Circuit, the instant cause stands in stark contradiction. As such, both Mr. Pickens and the court en banc would have suffered, from the appellate panel, a usurpation of judicial power, abuse of discretion and a direct violation of court rules and precedent[20]. Further, due to the injunction's prohibitions, the Supreme Court is the only court which is empowered to grant relief.

First, it is almost certain that the court, in *Holloway v. Navarro*, was unaware of the holding in *Exhibitors Poster Exchange*. The court determined not to publish the decision pursuant to Local Rule 47.5 [21] even though the decision was in direct conflict with *Exhibitors Poster Exchange* as to whether an appellate court could issue an original injunction. If the court had

---

20. *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir. 1991) ("In this circuit one panel may not overrule the decision, right or wrong, of a prior panel, in the absence of en banc consideration or superseding decision of the Supreme Court.") *See also Samaad v. City of Dallas*, 922 F.2d 216, 219 (5th Cir. 1991); *United States v. Don B. Hart Equity Pure Trust*, 818 F.2d 1246, 1250 (5th Cir. 1987); *Young v. Biggers*, 816 F.2d 216, 217 (5th Cir. 1987); *Alexander v. Chevron*, 806 F.2d 526 (5th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987); *Autry c. Estelle*, 706 F.2d 1394, 1401 (5th Cir. 1983); *United States v. Chanya*, 700 F.2d 192, 194 (5th Cir. 1983), *cert. denied*, 466 U.S. 1943 (1984); *Broussard v. Southern Pac. Transp. Co.*, 665 F.2d 1387, 1389 (Former 5th Cir. 1982) (en banc); *Howard v. Gonzales*, 658 F.2d 352, 359 (5th Cir. Unit A 1981); *Cavett v. Ellis*, 578 F.2d 567, 569 (5th Cir. 1978); *Manning v. M/V "Sea Road"*, 417 F.2d 603, 611 n.10 (5th Cir. 1969).

21. The court stated as follows: "Local Rule 47.5 provides: ' The publication of opinions that have *no precedential value* and merely decide particular cases on the basis of *well-settled principles* of law imposes needless expense on the public and burdens on the legal profession.' Pursuant to that Rule, the court has determined that this opinion should not be published." *Holloway v. Navarro*, Appeal No. 91-1541 (5th Cir. 1992) (emphasis added) (unpublished) (App. 10a).

decided not to publish the decision while aware of a conflicting decision, such would have been a direct violation of Local Rule 47.5 and the Fifth Circuit rule that one panel may not overrule another panel.[22] The above point is respectfully asserted to show that the panel could not have been aware of *Exhibitors Poster Exchange*. Accordingly, the unpublished decision should carry no precedential weight since the panel did not receive the benefit and wisdom of the holding in *Exhibitors Poster Exchange*. Nor did the panel have the opportunity to distinguish, or request en banc consideration to overrule *Exhibitors Poster Exchange*, as required by Fifth Circuit rules and decisions[23].

Second, the decision in *Green v. Carlson*, 649 F.2d 285 (5th Cir. 1981) neither mentions nor distinguishes *Exhibitors Poster Exchange*. However, the two cases may not be in conflict. In *Green v. Carlson* the court took specific notice that Green, a pro se prisoner, had filed over 500 cases. The court noted that other courts, and circuits, had in some way limited Green's future propensity to abuse the judicial process.

The court, in *Green v. Carlson*, invoked "*its* general supervisory power to control *its* docket"[24] (emphasis added). The court did not enjoin Green nor did the court order the district court to enforce injunctive relief against Green. Instead, the court limited what the clerk for the Fifth Circuit could accept for filing relative to writs of habeas corpus or mandamus and delineated

---

22. *See* note 20, *supra*.

23. *See* note 20, *supra*.

24. 649 F.2d at 287.

when Green could not proceed in forma pauperis. Further, the court *advised* the district court as to what could be done relative to any future filings by Green. The court left open to the district court the discretion to enjoin. However, the appellate court did *not* enjoin Green as to any future filings. The appellate court stated the district court may, not must or shall, take certain specified measures.

For the reasons stated above, it appears *Exhibitors Poster Exchange* remains valid precedent. Since the appellate court's decision, in the instant cause, refused to follow *Exhibitors Poster Exchange*, the Fifth Circuit should be granted the opportunity to review the cause en banc and Mr. Pickens should be granted the right to petition for en banc hearing. The grant of a writ of mandamus or prohibition will, accordingly, aid the Supreme Court's appellate jurisdiction.

3. **Proper Appellate Review of This Cause Can Not Be Conducted Because the Court of Appeals Failed to Make Findings of Fact In Support of the Original Injunction. The Grant of a Writ of Mandamus Will, Accordingly, Aid the Supreme Court's Appellate Jurisdiction.**

Rules 52(a) and 65(d) of the Federal Rules of Civil Procedure apply to permanent injunctions. *Alberti v. Cruise*, 383 F.2d 268, 271 (4th Cir. 1967) (citing *Hook v. Hook & Ackerman Inc.*, 213 F.2d 122, 130 (3rd Cir. 1954)). *See* 4 Moore's *Federal Practice* ¶ 52.07, p. 2668 (2d ed. 1966) (1966 Supp.) *Now, see* 5A Moore's *Federal Practice* ¶ 52.07 p. 52-151. The injunction, issued by the court of appeals, complies with neither rule.

Of course, the Federal Rules of Civil Procedure apply to district courts[25]. However, Rules 52(a) and 65(d) were developed for original proceedings, and they are adaptations of the procedures and safeguards developed from the common law. If it is permissible for the appellate court to conduct original proceedings, the court should be required to follow the rules developed for original proceedings. The original injunction fails to make the findings and conclusions required by Rule 52(a) and fails to set forth reasons for the injunction as required by Rule 65(d). A district court's issuance of an injunction identical to the appellate court's injunction would be a clear abuse of discretion[26]. The court of appeals should not have the discretion, *in original proceedings*, to disregard the rules it is duty bound to impose on district courts.

Other courts, considering similar injunctions, have held that adequate notice and hearing is required. *In Re Powell*, 851 F.2d 427, 431 (D.C. Cir. 1988); *In Re Oliver*, 682 F.2d 443, 446 (3rd Cir. 1982); *Delong v. Hennessey*, 912 F.2d 1144, 1147 (9th Cir.

---

25. Rule 1 of the Federal Rules of Civil Procedure.

26. *In Re Powell*, 851 F.2d 427, 431-434 (D.C. Cir. 1988); *DeLong v. Hennessey*, 912 F.2d 1144, 1147-1149 (9th Cir. 1990); *Mitchum v. Purvis*, 650 F.2d 647, 648 (5th Cir., Unit B, 1981).

1990). This Court has indicated that due process requires notice and an opportunity to be heard, and the standard for measuring the adequacy of this procedural protection increases in proportion to the significance of the interest at stake. *Morrissey v. Brewer*, 408 U.S. 471 (1972). The requirement of notice and hearing is especially appropriate where, as here, the request for an original injunction is raised on appeal in a brief unaccompanied by a separate motion, and, even more importantly, where no prior court has made findings that Mr. Pickens has been excessively litigious or that he has brought any action that was frivolous, harassing, in bad faith or for any other improper purpose. Notice and hearing should be required in this instance, where significant constitutional rights were subject to obliteration, where the request for original injunction was raised in an aberrated manner and where no prior findings of litigious misconduct existed. Further, petitioner is restricted from requesting a rehearing in respect to these matters due to the court's injunction which forbids such a request and orders the clerk for the Fifth Circuit to refuse to file same (App. 2a,3a).

Since the court made no findings in support of the injunction, it is difficult to ascertain the standards applied, or rationale used, to support the injunction. No court has ever found that Mr. Pickens has been involved in litigation which was frivolous, harassing or brought for some improper purpose. Nor has there ever been a finding that Mr. Pickens was excessively litigious. Other courts, in considering similar injunctions have ruled such findings are essential, and Rules 52(a) and Rule 65(d) of the Federal Rules of Civil Procedure require findings and enunciation of the reasons for the injunction. *In Re Powell*, 851 F.2d 427, 431 (D.C. Cir. 1988); *DeLong v. Hennessey*, 912 F.2d 1144, 1147-1148 (9th Cir. 1990). Here, however, neither the record of

prior litigation nor the instant litigation support such findings. More importantly, no such findings exist.

The court of appeals affirmed the district court on the basis of res judicata. However, the appellate court's decision is silent as to the reasoning for the injunction. If the court's rationale for the injunction was the affirmance of the district court's finding of res judicata, such a rationale is inadequate to support the issuance of an injunction.

An assertion of Mr. Pickens' legal rights, standing alone, is insufficient grounds for the issuance of the court's injunction[27]. Mr. Pickens brought the instant suit pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for, inter alia, fraud on the court. That is, Mr. Pickens asserted a legal right granted to him pursuant to Rule 60(b). By definition, Rule 60(b) encompasses situations where res judicata would apply *but for* the exceptions to res judicata allowed pursuant to Rule 60(b). Stated differently, an action under Rule 60(b) may attack a judgment which is "final." If the judgment is final, the doctrine of res judicata applies. However, exceptions to the doctrine of res judicata do exist and are enumerated in Rule 60(b). Affirming the district court on the basis of res judicata does not imply that Mr. Pickens

---

27. Otherwise, such constitutional rights as due process and the right of access to the courts would be without meaning or substance, for these rights could be barred for no other reason than that they were exercised. Further, a number of courts have held that litigiousness alone does not support the issuance of an injunction. *In Re Powell*, 851 F.2d 427, 434 (D.C. Cir. 1988) (citing *Ruderer v. United States*, 462 F.2d 897, 899 (8th Cir.) (per curiam), *cert. denied*, 409 U.S 1031 (1972)). *See also*, *Tripati v. Beaman*, 878 F.2d 351, 353 (10th Cir. 1989) (cites omitted). If litigiousness alone does not support the issuance of an injunction, an assertion of legal rights, standing alone, can not support the issuance of an injunction.

was attempting to circumvent the doctrine of res judicata in any improper manner or method not specifically allowed pursuant to Rule 60(b). The affirmance of the district court means nothing more than that, in the court's opinion, Mr. Pickens did not sufficiently plead a cause under Rule 60(b) and, accordingly, the Rule 60(b) exceptions to res judicata do not apply.

In summary, the failure of the court to enunciate the standard it applied in determining that an injunction should issue and the failure to make findings to support the injunction is a clear abuse of discretion. Especially so, where the court failed to provide adequate notice or hearing. Proper appellate review can not be conducted and mandamus will, accordingly, aid the Supreme Court's appellate jurisdiction.

B. There are Exceptional Circumstances Warranting the Exercise of the Supreme Court's Discretionary Power.

1. The Appellate Court's Decision Establishes Authority That a Federal Court of Appeals May Enjoin a Litigant From Petitioning the Supreme Court.

The appellate court's injunction, and the precedent it establishes, create exceptional circumstances for the exercise of the Supreme Court's discretionary powers because of the role the Supreme Court has in supervising lower federal courts, the significance of the constitutional rights involved and the extreme risks and difficulties involved in lawfully challenging the conduct prohibited.

The injunction significantly erodes, if not destroys, the

supervisory role of the Supreme Court over lower federal courts. Based on precedent established by the instant case, any federal court of appeals may enjoin petitioning to the Supreme Court. Once a litigant is enjoined, the Supreme Court is deprived of any realistic expectation of review to determine the propriety of the injunction. There is no reasonable method available for the Supreme Court to monitor when, how often or under what circumstances lower courts are enjoining petitioning to the Supreme Court.

Should the Court allow the use of such injunctions to enjoin petitioning to the Supreme Court, the Supreme Court will no longer fulfill its role as the "one Supreme Court"[28]. The Supreme Court is not "Supreme" when lower courts have exclusive power to determine what cases the Supreme Court will be allowed to hear. Such a precedent, as created in this case, is dangerous and presents exceptional circumstances warranting the exercise of the Supreme Court's discretionary power.

The right of access to the courts has often been viewed as the cornerstone to a free society dedicated to the rule of law over the whims of human conduct and emotion[29]. The conduct which precipitates a breakdown in the rule of law may be varied. The Constitution defines a number of barriers to prevent such a breakdown. Chief among such barriers is the right of access to the courts. Such access must be "adequate, effective and meaningful". *Bounds v. Smith*, 430 U.S. 817, 822 (1977). The right of access to the courts is no longer adequate, effective and

---

28. U.S. Const. art. III § 1

29. *Chambers v. Baltimore & Ohio Railroad*, 207 U.S. 142, 148 (1907).

meaningful when it can be denied arbitrarily or in contravention of constitutional provisions. A deliberate denial of the right of access to the courts to pursue a civil appeal is a deprivation of a substantive constitutional right found in the first amendment, as well as the potential deprivation of substantive and procedural due process. *Jackson v. Procunier*, 789 F.2d 307, 311 (5th Cir. 1986) Further, such a denial is arbitrary when it is not based on rules of law and facts. The court's denial of the right to petition this Court is arbitrary and a denial of substantive constitutional rights. As such, the injunction represents an insidious breakdown in the rule of law, and a destruction of the cornerstone of free society. Accordingly, exceptional circumstances warranting the exercise of the Supreme Court's discretionary powers do exist. The lower court's opinion now stands as precedent that others may likewise be so enjoined. Urgency, as well as exceptional circumstances, warrant the exercise of the Supreme Court's discretionary powers.

The exceptional circumstances warranting the exercise of this Court's discretionary powers are significantly exacerbated by the antarctic "chill" such an injunction places on any litigant who desires to petition this Court for review. As stated by the Fifth Circuit Panel in *Holloway v. Navarro, supra*, explaining the significance of the injunction which is almost identical to the injunction herein, "... by acting in contravention hereto, he will expose himself to the full panoply of sanctions available to this court, including, but not limited to, confinement, disbarment, fines, costs and attorney fees". (App. 12a).

No matter how legitimate a lawyer and his client believe their case to be, few, if any, would proceed to this Court under such circumstances. Certainly the right to petition this Court is

significantly impeded, chilled and likely terminated when it can only be exercised under the threat of possible confinement, disbarment, fines, costs and attorney fees. These circumstances are exceptional and urgent and warrant the exercise of the Supreme Court's discretionary power.

2. The Fifth Circuit Panel's Injunction Forbidding the Use of Procedures and Rights Granted by 28 U.S.C. § 46(c) and Rule 35 of the Federal Rules of Appellate Procedure is a Usurpation of Judicial Power and Clear Abuse of Discretion Creating Exceptional Circumstances Warranting the Exercise of the Supreme Court's Discretionary Powers.

The circuit court panel's injunction forbids petitioner from requesting en banc review and forbids the clerk for the Fifth Circuit from filing same if tendered (App. 2a,3a). The injunction usurps the limited judicial power granted to the court pursuant to 28 U.S.C. § 46(c) and Rule 35 of the Federal Rules of Appellate Procedure. Also, the court clearly abused its discretion in forbidding petitioner from exercising rights granted by statute and court rules.

28 U.S.C. § 46(c) authorizes the various circuits to hear cases and controversies in panels composed of three judges unless a hearing or rehearing before the court en banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. Rule 35 of the Federal Rules of Appellate Procedure effectuates the dictates of 28 U.S.C § 46(c). Specifically, the authorization for each circuit to sit as panels of three is conditioned and limited.

The court's injunction forbids petitioner from seeking the en banc hearing authorized by 28 U.S.C. § 46(c) and Rule 35. As such, the court has exceeded its authorized exercise of jurisdiction through forbidding use of the procedure necessary to effectuate the dictates of 28 U.S.C. § 46(c). The very existence of the panel's authority to hear the case hinges on there not being a majority vote for en banc review. The panel's injunction, which enjoins use of the very procedure which determines whether the panel is authorized to exist, exceeds the panel's lawful jurisdiction. The Supreme Court has expressly recognized that a writ of mandamus is an appropriate remedy to restrict a lower court to a proper exercise of its authorized jurisdiction[30] and to enforce court rules[31].

The Supreme Court has also recognized that mandamus is an appropriate remedy to compel a lower court to exercise its judicial authority when it has failed to act in circumstances giving rise to a duty to act[32]. Here the Fifth Circuit has a duty to operate pursuant to the dictates of 28 U.S.C. § 46(c). However, the injunction is an unlawful impediment to the effectuation of 28 U.S.C. 46(c) and the court's duty. Such impediment denies the Fifth Circuit the means to effectuate its duties pursuant to 28

---

30. *Kerr v. United States Dist. Court for Northern Dist.*, 426 U.S. 394 (1976); *Schlagenhauf v. Holder*, 379 U.S. 104 (1964); *Re Metropolitan Trust Co.*, 218 U.S. 312 (1910); *Ex parte Harley-Davidson Motor Co.*, 259 U.S. 414 (1922).

31. *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); *Los Angeles Brush Mfg. Corp v. James*, 272 U.S. 701 (1927) *McCullough v. Cosgrave*, 309 U.S. 634 (1940).

32. *Kerr v. United States Dist. Court for Northern Dist.*, 426 U.S. 394 (1976); *Ex parte Parker*, 120 U.S. 737 (1887); *Ex parte Burtis*, 103 U.S. 238 (1881); *Ex parte Harley-Davidson Motor Co.*, 259 U.S. 414 (1922).

U.S.C. § 46(c). The Fifth Circuit's convening of an en banc court is, of course, discretionary. However, the authorization to convene upon majority vote of active circuit judges is not discretionary. Any decision to convene, or not, by any method other than as authorized by 28 U.S.C. 46 (c) violates the statute and should be void. 28 U.S.C. § 46(c) would be effectuated through removal of the injunction and allowance of petitioner to request en banc review.

Due to the Fifth Circuit panel's clear abuse of discretion and usurpation of judicial power, exceptional circumstances exist warranting the exercise of the Supreme Court's discretionary powers.

3. The Court of Appeals Clearly Abused its Discretion in Failing to Make Findings and Conclusions in Support of the Injunction. Such Failure Defeats Proper Appellate Review and Warrants the Exercise of the Supreme Court's Discretionary Powers.

The court's original injunction involves the determination of the appropriate standard to be used in applying the law to the facts. The applicable law must be determined, the relevant facts must be ascertained and an application of the law to the facts must be made. As discussed herein, it is respectfully asserted that the court's decision is grossly inadequate on all three counts. Such substantive insufficiency prevents adequate appellate review and should be sufficient grounds to warrant the exercise of the Supreme Court's discretionary powers. Specifically, once the appellate court accepted original jurisdiction to issue the injunction, it had the duty to determine the applicable law, relevant facts and apply the law to the facts. The appellate court wholly failed

to perform its duty in each required area. As such, mandamus is an appropriate remedy to require the appellate court to decide the issues it has a duty to decide. *Ex parte Harley-Davidson Motor Co.*, 259 U.S. 414 (1922); *Schlagenhauf v. Holder*, 379 U.S. 104 (1964).

In determining the applicable law, the facts relevant to the law and the interaction of the facts in this cause to the applicable law, it seems appropriate to review three separate areas. First, the general law of sanctions is ancillarily related. Second, since an injunction has been issued, standards of law used for issuance of injunctions are relevant. Finally, the constitutional right of access to the courts is involved because the court's injunction limits access to the courts.

This cause is not directly related to sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure or Rule 38 of the Federal Rules of Appellate Procedure. Nor does it appear the appellate court applied any statute related to sanctions. The appellate court did not state the basis for its injunction. However, it seems a good guess that the court sought to invoke its powers under the All Writs Act, 28 U.S.C. § 1651(a) and possibly its general supervisory powers. This cause is related to sanctions to the extent there is a court-imposed punishment which restricts conduct and the exercise of the right of access to the courts. The court's decision is also a sanction because the full judicial power of contempt proceedings, relating to possible confinement, fines and further restrictions on liberty and property, are now loaded and aimed directly at petitioner. To flinch, at this time, in the wrong direction could be "deadly". *Schmidt v. Lessard*, 414 U.S. 473, 476-477, Note 2 (1974). Accordingly, it is difficult to understand how sanctions are not somehow implicitly involved.

The reasons for the grant of sanctions must be in a form sufficient for review by the appellate court[33]. Here, the court did not state the reasons for the grant of sanctions nor did it state the basis, in law, for such sanctions in any form sufficient for review.

Further, no basis can be discerned, from the court's decision, for the injunction. The court's decision identifies no conduct engaged in by Mr. Pickens, beyond that which every American has an unhampered right to so engage. The court does not state that Mr. Pickens has been overly litigious. Even if the court had so stated, such grounds would still be inadequate[34]. The court did not find Mr. Pickens has ever engaged in any litigation in bad faith, or that was frivolous, or that was in any way ever engaged for any wrong reason or purpose.

In fact the court's decision fails to mention that Mr. Pickens filed the instant action pursuant to Rule 60(b) for, inter alia, fraud on the court. The nature of the action filed is, of course, a critical matter to distinguish for purposes of res judicata. A direct attack on a prior judgment might be subject to res judicata if not

---

33. *Aiken v. Q.L. Investments, Inc.*, 959 F.2d 521, 535 (5th Cir. 1992) ("In cases in which the sanctions imposed are substantial in amount, type or effect, appellate review of the sanctions is particularly rigorous. In such cases, the district court *must* enter specific factual findings to assist the appellate court in its review of the Rule 11 Sanctions"). (emphasis added). *See, also Thomas v. Capital Sec. Services, Inc.*, 836 F.2d 866, 883 (5th Cir. 1988) (en banc).

34. ..."mere litigiousness alone does not support the issuance of an injunction." *In Re Powell*, 851 F.2d 427, 434 (D.C. Cir. 1988) (cites omitted). *Also see Tripati v. Beaman*, 878 F.2d 351, 353 (10th Cir. 1989) (cites omitted). ..."multiple filings alone can not be a predicate to a finding of frivolousness." *In Re Powell, supra*, 851 F.2d at 434, note 14.

brought pursuant to the exceptions to res judicata implicit in Rule 60(b). However, the instant action brought pursuant to Rule 60(b) could not be dismissed on the basis of res judicata[35] unless the court found Rule 60(b) exceptions did not apply[36]. Whatever the reason, the court's judgment may, of course, be properly attacked in a writ of certiorari to this Court. However, the critical point made here is that whatever the court's reasoning was, it was not expressed in any way, shape, form or fashion supportive of an injunction barring a litigant's right of access to the courts.

The court's opinion fails to identify any conduct beyond that which every American has an unhampered right to enjoy. The court's reasoning, whether recondite, furtive or extempore, is incapable of determination. An adequate basis for appellate review would exist if the court had either followed district court rules pertaining to original injunctions[37] or followed the standards imposed by other circuits governing the issuance of

---

35. In *Jordon v. Gilligan*, 500 F.2d 701, 710 (6th Cir. 1974) (cites omitted), the district court had dismissed a Rule 60(b) motion because "the judgment entered herein is res judicata as to any issue which was or could have been raised in the initial proceedings". The court of appeals reversed the district court and stated, ... "the doctrine of res judicata does not preclude a litigant from making a direct attack [under Rule 60(b)] upon the judgment before the court which rendered it." *See also Bros Incorporated v. W.E. Grace Manufacturing Company*, 320 F.2d 594, 606-607 (5th Cir. 1963).

36. For examples where the court found that Rule 60(b) did not apply *see Miller v. Meinhard-Commercial Corporation*, 462 F.2d 358, 361 (5th Cir. 1972); *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 873-874 (5th Cir. 1984).

37. Rule 52(a) and 65(d) of the Federal Rules of Civil Procedure.

injunctions restraining access to the courts[38]. The court's decision provides an inadequate basis for appellate review, thus warranting the exercise of the Supreme Court's discretionary powers.

Further, it is respectfully suggested that when a court enjoins a litigant's access to the court, a more stringent standard should be applied both to the original findings in support of the injunction and in the appellate review process. At least one court of appeals, while supporting standards for injunctions, has indicated such standards may be lowered when the right of access to the courts is involved[39]. However, this Court reasoned, in *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) that the required adequacy of the procedural protections of the due process clause increase in proportion to the significance of the interest at stake. It seems to follow that the right characterized as "the right conservative of all other rights"[40], "among the most precious of the liberties safeguarded by the Bill of Rights"[41] and "having a sanctity and a sanction not permitting dubious intrusions"[42] should require greater scrutiny, rather than less, before denial.

---

38. *In Re Powell*, 851 F.2d 427, 431-434 (D.C. Cir. 1988); *Sires v. Gabriel*, 748 F.2d 49, 51-52 (1st Cir. 1984); *DeLong v. Hennessey*, 912 F.2d 1144, 1147-1149 (9th Cir. 1990).

39. *In Re Martin-Trigona*, 737 F.2d 1254, 1262 (2nd Cir. 1984) (finding that irreparable injury and inadequate relief at law, do not apply to issuance of injunction against a vexatious litigant).

40. *Chambers v. Baltimore & Ohio Railroad*, 207 U.S. 142, 148 (1907).

41. *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967).

42. *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Whether the court's original injunction is viewed as a sanction, original injunction or the enjoining of the exercise of a fundamental constitutional right, the court's opinion fails to provide an adequate basis for review. The court's decision articulates no standards or conclusions relative to the basis for the injunction. Nor does the court make findings of fact in support of the injunction. Without either conclusions of law or findings of fact, there is, of course, no application of the law to the facts. "If the record does not provide a sufficient basis to ascertain the legal and factual grounds for issuing the injunction or if the findings are inadequate to explain the basis for that ruling or to permit meaningful review, the appellate court must vacate the injunction and remand to the district court for further findings." *Professional Plan Examiners of N.J. v. Lefante*, 750 F.2d 282, 289 (3rd Cir. 1984) (citing *H. Prang Trucking Co. v. Local Union No. 469*, 613 F.2d 1235, 1248-1239 (3rd Cir. 1980): 5A J. Moore, *Federal Practice* ¶ 52.06 [2] at 52-153). *See also White v. Carlucci*, 862 F.2d 1209, 1210-1211, note 1 (5th Cir. 1989).

C. Adequate Relief Can Not be Obtained in any Other Form or From Any Other Court.

1. The Injunction, Issued by the Court of Appeals, Forbids a Motion for Re-Hearing or Rehearing En Banc and the Clerk for the Fifth Circuit is Ordered Not to File Such Motion. Accordingly, Adequate Relief Can Not be Obtained in Any Other Form or From Any Other Court.

The injunction, issued by the court of appeals, forbids a motion for rehearing or rehearing en banc and the clerk for the

Fifth Circuit is ordered not to file such motion. (App. 3a). Further, the injunction forbids "taking any action or filing any pleadings concerning any matter or issue of any nature ... existing between Pickens ... and Lockheed Corporation ...". (App. 2a, 3a). Petitioner can not attempt to file a motion for rehearing or rehearing en banc without violating the injunction. Further, petitioner can not file such motion for rehearing or rehearing en banc because the Clerk for the Fifth Circuit is ordered not to file any pleadings so tendered.

The *only* procedure available to obtain the right to file a motion for rehearing or rehearing en banc is by writ of mandamus. The only court capable of acting on the writ is the Supreme Court. Accordingly, adequate relief can not be obtained in any form other than by writ of mandamus or from any other court other than the Supreme Court.

2. The Injunction Violates 28 U.S.C. § 46(c) Through Denying the Fifth Circuit the Means to Convene En Banc. Writ of Mandamus is the Only Adequate Remedy and Due to the Injunction, The Supreme Court of the United States is the Only Court Which May Grant Relief.

The Fifth Circuit's convening of an en banc court is discretionary. However, the authorization to convene upon majority vote of active circuit judges is not discretionary. Any decision to convene, or not, or an injunction prohibiting the means available to convene, by any method other than as authorized by 28 U.S.C. 46(c) violates the statute and should be void. 28 U.S.C. 46(c) would be effectuated through removal of the injunction and allowance of petitioner to request en banc review.

3. The Injunction Against Proceeding to this Court is an Unconstitutional Violation of Mr. Pickens' Right of Access to the Courts. However, a Writ of Certiorari Can Not be Filed Without Exposing Petitioner's Client to a Finding of Contempt Leading to Possible Loss of Liberty and Property. The Only Adequate Relief Available, to Properly Protect Petitioner's Client is by Writ of Mandamus to the Supreme Court of the United States.

If petitioner were to file a writ of certiorari, challenging the injunction and the court's decision on the merits, he would risk a contempt finding against his client which could result in his client's loss of liberty and property. It is arguable that the Fifth Circuit would not have jurisdiction to make a contempt finding during the pendency of the writ of certiorari before this Court. However, it is not arguable that the grant of certiorari is a matter of discretion. For whatever reason, should this Court decide not to grant a writ of certiorari, petitioner's client would then be exposed to the full panoply of sanctions and contempt proceedings. Such a full panoply of evils could be executed even though the claims of petitioner's client were entirely meritorious. That is, this Court could accept the merits of the claims of petitioner's client, yet for some other reason, decide this cause was not appropriate to grant a writ of certiorari. Thus, Mr. Pickens could be exposed to the full panoply of sanctions and contempt proceedings, including loss of liberty and property, even though his claims were meritorious.

Respectfully, it is suggested, such a minatory set of circumstances unconstitutionally "chills" Mr. Pickens' right of access to the courts and due process rights consistent with liberty and

property. Accordingly, the only adequate relief available, to properly protect petitioner's client, is by writ of mandamus to the Supreme Court of the United States.

D. Petitioner Has Standing to Bring the Instant Writ of Mandamus.

The court's decision affirming the district court and the appellate court's issuance of the original injunction has caused petitioner injury in fact. Petitioner has suffered economic injury and injury to the exercise of his profession. In addition, petitioner has suffered the invasion of a legal and constitutional right as well as a present threat and risk to his liberty and property rights. Petitioner has both a present professional and personal interest in the property rights involved in the court's decision as well as the injunction itself. Petitioner is both subject to and affected by the court's decision and injunction. The issuance of mandamus, as requested herein, will vindicate and protect the rights and interests of petitioner and of his client.

Petitioner is the attorney of record for all actions conducted for Mr. Pickens in the instant cause (R.1). Petitioner has suffered economic loss resulting from the court's decision and injunction. A violation of the injunction is as enforceable against petitioner as it would be his client. Thus petitioner's losses are both economic and professional. Petitioner has personal, legal and constitutional rights involved which have been invaded and threatened with extinction. The court's injunction, and the bringing of this action, also place at risk the loss of his profession through suspension or disbarment. Further, the court's decree directly affects the exercise of professional conduct, actions and obligations petitioner owes to his client.

It is respectfully asserted that petitioner fulfills every requirement for standing equal to the standing his client would clearly have. *Associate Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970); *United States Department of Labor v. Triplett*, 494 U.S. 715 (1990); *Singleton v. Wulff*, 428 U.S. 106 (1976); *Doe v. Bolton*, 410 U.S 179 (1973). Petitioner's client, now 81 years old, should not be needlessly exposed to harm.

PRAYER

For the foregoing reasons, petitioner prays:

1. That a writ of mandamus or prohibition issue from this Court directed to the Honorable Judge Carolyn King, Honorable Judge Patrick Higginbotham and Honorable Judge Harold DeMoss, Jr., Judges of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana, to show cause on a day to be fixed by this Court why mandamus or prohibition should not issue from this Court directing said Judges to vacate the judgment and injunction imposed pursuant to the court's order of May 21, 1993 pending in the Court of Appeals for the Fifth Circuit; and, that said Judges be prohibited from initiating sanctions against petitioner, and/or his client, for any conduct occurring to date and prohibited from enjoining petitioner, and/or his client, without show cause with a full evidentiary hearing and prohibited from enjoining further proceedings to the Supreme Court, or for rehearing or suggestion for rehearing en banc before the Fifth Circuit;

2. That upon the issuance of a writ of mandamus or prohibition petitioner be granted 30 days to file a motion for rehearing or suggestion for rehearing en banc with the Court of

Appeals for the Fifth Circuit to review the panel's decision;

3. That the Supreme Court consider, and if deemed appropriate, investigate this matter pursuant to the Court's equitable powers;[43]

4. That petitioner have such additional relief and process as may be necessary and appropriate.

Respectfully submitted,

David Parker, Esquire, *Petitioner*
Pro Se

43. *Universal Oil co. v. Root Rfg. Co.*, 328 U.S. 575, 580 (1946); *Hazel Atlas Co. v. Hartford Co.*, 322 U.S. 238, 244-246 (1944); *Root Refining Co. v. Universal Oil Products Co.*, 169 F.2d 514, 521-523 (3rd Cir. 1948).

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

In re DAVID PARKER, *Petitioner*

PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION TO THE HONORABLE JUDGE CAROLYN KING, HONORABLE JUDGE PATRICK HIGGINBOTHAM AND HONORABLE HAROLD DeMOSS, JR., JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT NEW ORLEANS, LOUISIANA

APPENDIX

David Parker, Esquire, *Petitioner*
5747 Westcreek Drive
Fort Worth, Texas 76133
(817) 370-8299
Pro Se

INDEX TO APPENDIX

FIFTH CIRCUIT OPINION AND INJUNCTION 1a

DISTRICT COURT OPINION 4a

HOLLOWAY V. NAVARRO 9a

THE CONSTITUTION OF THE UNITED STATES 13a
(Article III)

UNITED STATES STATUTES 15a
28 U.S.C. § 1651
28 U.S.C. § 46

FEDERAL RULES OF CIVIL PROCEDURE 17a
Rule 1
Rule 52(a)
Rule 65(d)

FEDERAL RULES OF APPELLATE PROCEDURE, ... 19a
LOCAL RULES AND INTERNAL OPERATING
PROCEDURES OF THE FIFTH CIRCUIT
FRAP 35
Local Rule 35
Local Rule 47.5 and I.O.P.'s

PICKENS v. LOCKHEED CORP.

Richard W. PICKENS, et al.,
Plaintiffs-Appellants,

v.

LOCKHEED CORPORATION, et al.,
Defendants-Appellees

No. 92-1744.

United States Court of Appeals
Fifth Circuit

May 21, 1993.

Debtors brought action seeking to set aside part or all of the provisions of confirmed joint plan of reorganization. The United States District Court for the Northern District of Texas, A. Joe Fish, J., denied relief, and debtors appealed. The Court of Appeals held that res judicata barred debtors' claims.

Affirmed.

Bankruptcy - 3568(2)

Res judicata barred debtors from seeking to set aside part or all of the provisions of joint plan of reorganization that was confirmed by bankruptcy court and affirmed on appeal; debtors' claims either could have been brought in many previous proceedings, or they were brought and ultimately rejected.

Appeal from the United States District Court for the Northern District of Texas.

Before KING, HIGGINBOTHAM and DeMOSS, Circuit Judges.

PER CURIAM:

This case is the latest and last of a series of cases brought by Richard W. Pickens ("Pickens"), Texas Extrusion Corp. ("TEC") or Pickens Industries, Inc. ("PII") seeking to set aside part or all of the provisions of a joint plan of reorganization applicable to Pickens, TEC and PII which was confirmed by the Bankruptcy Court for the Northern District of Texas in 1984 and affirmed by this Court in *Texas Extrusion Corp. v. Lockheed Corp.*, 844 F.2d 1142 (5th Cir.), *cert. denied*, 488 U.S. 926, 109 S.Ct. 311, 102 L.Ed.2d 330 (1988). The district court denied relief here on the basis, *inter alia*, that all the claims in the lawsuit were barred by the doctrine of *res judicata* and on the basis that the lawsuit was not brought within six months of the entry of the order approving the joint plan of reorganization as required by 11 U.S.C. § 1144. The district court was indisputably correct in dismissing this case. All the claims asserted by Pickens, TEC and PII either could have been brought in the many previous proceedings or they were brought and ultimately rejected.

Although we would be justified in assessing sanctions against Pickens, TEC and PII as Lockheed has requested, we have elected not to do so. Our decision, however, is without prejudice to Lockheed's right to re-urge the imposition of sanctions should Pickens, TEC or PII attempt to act in contravention of the order and judgement rendered herein.

We expressly forbid Pickens, TEC and PII, and each of them, from taking any action or filing any pleadings concerning any matter or issue of any nature arising from or connected with the litigation

or causes of action heretofore asserted or existing between Pickens, TEC or PII, on the one hand, and Lockheed Corporation or any of its affiliates, on the other hand. Without first obtaining the express approval of a judge of this Court, neither the Clerk of this Court, nor the clerk of any district court or bankruptcy court within the Fifth Circuit shall accept for filing any pleading or other document proffered by or on behalf of Pickens, TEC or PII as to any such matter or issue, including, without limitation, motions for rehearing or rehearing en banc in connection herewith, which we expressly forbid them to file.

The judgment of the district court is AFFIRMED and the mandate shall issue forthwith.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD W. PICKENS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	CIVIL ACTION NO.
VS.	§	
	§	3:92-CV-0302-G
LOCKHEED CORPORATION, ET AL.	§	
	§	
Defendants.	§	

MEMORANDUM ORDER

Before the court is the motion of defendants, Lockheed Corporation, Lockheed Finance Corporation, and Lockheed California Corporation (collectively, "Lockheed"), to dismiss this case under Fed. R. Civ.P.12(b)(6) for failure to state a claim upon which relief can be granted. For the reasons stated below, the motion is granted.

A motion under Rule 12(b)(6) should be granted only when it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442-43 (5th Cir.), cert. denied, 476 U.S. 1159 (1986); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The court must accept as true all well-pleaded facts in

the complaint and construe the complaint liberally in favor of the plaintiffs *Abdul-Alim Amin v. Universal Life Insurance Company of Memphis, Tennessee,* 706 F.2d 638, 640 (5th Cir. 1983). The court should also give the plaintiffs an opportunity to amend their complaint, rather than dismiss it, if it appears that a more carefully drafted complaint might state a claim upon which relief could be granted. *Friedlander v. Nims*, 755 F.2d 810, 813 (11th Cir. 1985). *See also Dussouy v. Gulf coast Investment Corporation*, 660 F.2d 594, 597-99 (5th Cir. 1981).

On February 14, 1992, plaintiffs filed the instant complaint entitled "Independent Action" seeking, under Fed. R. Civ. P. 60(b), to set aside a number of prior judgments for alleged fraud on the court. The judgments plaintiffs seek to set aside were entered more than one year prior to the filing of the instant action.

Rule 60(b) provides, in pertinent part, that it does not limit the power of the court "to set aside a judgment for fraud upon the court." The Fifth Circuit has held, however, that relief on this ground "is reserved for only the most egregious misconduct," and that the party seeking relief must show the existence of "an unconscionable plan or scheme which is designed to improperly influence the court in its decision." *Wilson v. Johns-Manville Sales Corp.*, 873 F.2d 869, 872 (5th Cir.), cert. denied, 493 U.S. 977 (1989) (quoting *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978)). *See also Kerwit Medical Products, Inc. v. N. & H. Instruments, Inc.*, 616 F.2d 833, 836-37 (5th Cir. 1980) ("[o]nly a small number of those acts that can be considered fraud amount to 'fraud upon the court'"). The fraud must "'defile the court itself, or [be] a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner.'" *Kerwit*, 616 F.2d at 837 (quoting 7 MOORE'S FEDERAL PRACTICE ¶ 60.33 at 511 (1971 ed.)). *See also Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985), cert. denied, 474 U.S. 1086 (1986) (fraud on the

court found only "where the court or a member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial function"); *Lockwood v. Bowles*, 46 F.R.D. 625, 632 (D.D.C. 1969) ("[e]xamples [of fraud on the court] are bribery of judges, employment of counsel to 'influence' the court, bribery of the jury, and the involvement of an attorney...in the perpetration of fraud") (footnotes omitted).

Plaintiffs allege numerous acts that they claim constitute fraud on the court sufficient to set aside the judgments involved. These acts include:

(1) the alleged procurement by Lockheed of a renegotiated contract with plaintiffs through unconscionable conduct, fraud, and duress;

(2) the existence of a conspiracy between Lockheed and other entities to force plaintiffs out of business in violation of the antitrust laws and RICO;

(3) the failure of the trustee in the bankruptcy case of Texas Extrusion Corporation ("TEC") to assert an equitable subordination claim against Lockheed;

(4) the trustee in TEC's bankruptcy case fraudulent undervaluation of TEC's antitrust claims against Lockheed;

(5) the breach of fiduciary duty of counsel for Richard Pickens ("Pickens") in failing to submit a proposed plan of reorganization in Pickens' bankruptcy case;

(6) the acceptance by the bankruptcy court, in the confirmed plan of reorganization, or releases and assignments by Pickens and TEC of their antitrust claims against Lockheed;

(7) *ex parte* contact between the bankruptcy court and the parties -- adverse to plaintiffs in the bankruptcy case -- who drafted the court's findings;

(8) the misrepresentation of the debts of the estate at the confirmation hearings;

(9) the inaccessibility for two years of blueprints relating to patents awarded to Pickens by the bankruptcy court; and

(10) the destruction of machinery at the TEC plant by the purchaser in bankruptcy.

With the exception of the alleged improper *ex parte* contact with the bankruptcy court during the pendency of the plaintiffs' bankruptcy cases, none of the other acts is of a type that might "defile the court" or cause the corruption of, or improper influence on, the court. Accordingly, allegations 1 through 6 and 8 through 10 do not constitute fraud on the court.

The *ex parte* contact complained of in allegation 7 is also insufficient to support a finding of fraud on the court. The Fifth Circuit, in affirming the joint plan of confirmation entered in plaintiffs' bankruptcy case, held that the contact was not prohibited because the bankruptcy judge had announced his findings from the bench prior to the contact, and that the contact was merely for purposes of memorializing such findings. *Matter of Texas Extrusion Corp.*, 844 F.2d 1142, 1164 (5th Cir.), *cert. denied*, 488 U.S. 926 (1988).

All of the activities plaintiffs complain of were fully known and adjudicated against plaintiffs in previous proceedings. Plaintiffs are barred by the doctrine of *res judicata* from relitigating their grievances here. Because plaintiffs have not alleged grounds

sufficient to justify setting aside the prior judgments under Rule 60(b), F.R. Civ. P., defendants' motion to dismiss is GRANTED.

SO ORDERED.

August 4, 1992

A. JOE FISH
United States

District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1541

IN THE MATTER OF: PAT E. HOLLOWAY, Debtor,

PAT E. HOLLOWAY, Appellant,

versus

DON NAVARRO, TRUSTEE, ET AL.,

Appellees,

Appeal from the United States District Court
for the Northern District of Texas
(CA3-86-3058-K)

(January 3, 1992)

Before GOLDBERG, JOLLY and WIENER, Circuit Judges.

PER CURIAM*.

This court is determined to ensure that the instant appeal is absolutely the final akirnish in the "unrelenting battle between the Brownings and the Holloways, which began in 1979 (and which) is

a familiar fray to the (Fifth Circuit). [1] As a practical matter, this jurisprudential war has long since ended, the sole vestigial problem is, however, that Appellant Holloway, himself an attorney at law, has steadfastly refused (or been unable) to accept that fact. Today we do all within our power to drive home that reality.

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens of the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

---

1. *Browning v. Navarro*, 826 F.2d 335, 337 (5th Cir. 1987).

First, we dismiss the instant appeal as wholly frivolous and meritless.

Second, we hold that the Appellees are entitled to continue all lawful efforts to enforce their judgments, both pecuniary and proprietary, against Appellant Holloway and any assets, funds, interests and properties of any nature that he may have, and order that such collection efforts, whether in state or federal court, not be impeded or interfered with in any manner whatsoever by or on behalf of Appellant Holloway.

Third, in an act of possible excessive grace--one which we are confident the Appellees will find unduly charitable but which we hope Appellant Holloway will accept as this court's final act of mercy in recognition of his painful sufferings at the hands of the furies which have dogged his psyche for over a decade--we decline to grant the sanctions against Appellant for which Appellees have prayed and convincingly argued to this court. We do so, however, without prejudice to Appellees' right to re-urge the imposition of sanctions should Appellant attempt to act in contravention of the orders and judgment rendered herein.

Fourth, we expressly forbid Appellant to take any actions or file any pleadings concerning any matter or issue of any nature arising from or connected with the litigation or causes of actions heretofore asserted or existing between himself and Appellee Navarro, the Brownings, or any one or more of them. Without first obtaining the express approval of a judge of this court, neither the clerk of this court, nor the clerk of any district court or bankruptcy court within the Fifth Judicial Circuit, shall accept for filing any pleading or other document proffered by or on behalf of Appellant Holloway as to any such matter, including, without limitation, motions for rehearing or rehearing on banc hereto, which we expressly forbid him to file.

We sternly warn Mr. Holloway that, should he exhibit his failure to accept the finality of this litigation, which for more than a dozen years has burdened and abused not only his opponents but also the bankruptcy courts and district courts of the Fifth Circuit, as well as this court, by acting in contravention hereto, he will expose him to the full panoply of sanctions available to this court, including, but not limited to, confinement, disbarment, fines, costs and attorneys' fees. In short, no further act or action by Mr. Holloway in this or any related matter will be tolerated.

The judgment of the district court is AFFIRMED.

THE CONSTITUTION OF THE UNITED STATES

Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -to all Cases affecting Ambassadors, other public Ministers and Consuls; -to all Cases of admiralty and maritime Jurisdiction; -to Controversies to which the United States shall be a Party; -to Controversies between two or more States; -between a state and Citizens of another State; - between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[3] The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the

said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. [1] Treason against the United States, shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2] The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

UNITED STATES STATUTES

28 U.S.C. § 1651

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, § 90, 63 Stat. 102.

28 U.S.C. § 46

§ 46. Assignment of judges; panels; hearings; quorum

(a) Circuit judges shall sit on the court and its panels in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs. The United States Court of Appeals for the Federal Circuit shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and, notwithstanding the first sentence of this subsection, may determine by rule the number of judges, not less than three, who constitute a panel.

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member.

(d) A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

(As amended Oct. 20, 1978, Pub.L. 95-486, § 5(a), 92 Stat. 1633; Apr.2, 1982, Pub.L. 97-164, Title I, § 205, 96 Stat. 25, 53.)

FEDERAL RULES OF CIVIL PROCEDURE

RULE 1. SCOPE OF RULES

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

[Amended effective October 20, 1949; July 1, 1966.]

RULE 52. FINDINGS BY THE COURT; JUDGMENT ON PARTIAL FINDINGS

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings of fact are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision

filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

RULE 65. INJUNCTIONS

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

FEDERAL RULES OF APPELLATE PROCEDURE, LOCAL RULES AND INTERNAL OPERATING PROCEDURES OF THE FIFTH CIRCUIT.

DETERMINATION OF CAUSES BY THE COURT IN BANC

FRAP 35

(a) **When Hearing or Rehearing In Banc Will Be Ordered.** A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decision, or (2) when the proceeding involves a question of exceptional importance.

(b) **Suggestion of a Party for Hearing or Rehearing In Banc.** A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

(c) **Time for Suggestion of a Party for Hearing or Rehearing In Banc; Suggestion Does Not Stay Mandate.** If a party desires to suggest that an appeal be heard initially in banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

(Amended effective Aug. 1, 1979.)

LOCAL RULE 35

35.1 Caution. *As is noted in FRAP 35, en banc hearing or rehearing of appeals is not favored. Among the reasons for this is that each request for en banc consideration must be studied by every active judge of the court and hence is a serious call on limited judicial resources. Counsel have a duty to the Court commensurate with that owed their clients to read with attention and observe with restraint the certificates required of them in 35.2.2 below. The Court takes the view that, given the extraordinary nature of suggestions for en banc consideration, it is fully justified in imposing sanctions of its own initiative under, inter alia, Fed.R.App.P. 38 and 28 U.S.C. § 1927, upon the person who signed the suggestions, the represented party, or both, for manifest abuse of the procedure.* (Amended Oct. 8, 1990).

35.2 Form of Suggestion. *Twenty copies of every suggestion of en banc consideration, whether upon initial hearing or rehearing, shall be filed. The suggestion shall not be incorporated in the petition for rehearing before the panel, if one is filed, but shall be complete in itself. In no case shall a suggestion of en banc consideration adopt by reference any matter from the petition for panel rehearing or from any other briefs or motions in the case. A suggestion of en banc consideration shall contain the following items, in order:*

35.2.1 Certificate of interested persons required for briefs by Loc.R. 28.2.1;

35.2.2 If the party suggesting en banc consideration is represented by counsel, one or both of the following statements of counsel, as applicable:

> *I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the United States court of Appeals for the Fifth Circuit [or the Supreme Court of the United States], and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court: [citing specifically the case or cases]*

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:
[set forth each question in one sentence']

_____
Attorney of record for _____

Counsel are reminded that in every case the duty of counsel is fully discharged without filing a suggestion for rehearing en banc unless the case meets the rigid standards of FRAP 35(a).

35.2.3 Table of contents and citations;

35.2.4 Statement of the issue or issues asserted to merit en banc consideration. It will rarely occur that these will be the same as those appropriate for panel rehearing. A suggestion of en banc consideration must be limited to the circumstances enumerated in FRAP 35(a);

35.2.5 Statement of the course of proceedings and disposition of the case;

35.2.6 Statement of any facts necessary to the argument of the issues;

35.2.7 Argument and authorities. These shall concern only the issues required by paragraph (.2.4) hereof and shall address specifically, not only their merit, but when they are contended to be worthy of en banc consideration;

35.2.8 Conclusion; and

35.2.9 Certificate of service.

35.3 Response to Suggestion. *No response to a suggestion of en banc consideration will be received unless requested by the Court.*

35.4 Time and Form-Extensions. *Any petition for a suggestion of en banc consideration upon rehearing must be filed within 14 days after the date of the opinion. Counsel should not request extensions of time except for the most compelling reasons. Printing delays will not be considered sufficient justification for extensions as clear and legible reproduced copies of typewritten petitions are authorized in the form prescribed in FRAP and Loc.R. 32.*

*35.5 **Length.** A suggestion for en banc consideration shall not exceed 15 pages in length, without permission of the Court.*

*35.6 **Determination of Causes En Banc and Composition of En Banc Court.** A cause shall be heard or reheard en banc when it meets the criteria for en banc set out in FRAP 35(a), and if a majority of the circuit judges who are in regular active service order that the appeal or other proceedings be heard or reheard en banc. For purposes of en banc voting under 28 U.S. C. § 46(c), the term "majority" is defined as a majority of all judges of the court in regular active service presently appointed to office. Judges in regular active service who are disqualified for any reason or who cannot participate in the decision of an en banc case nevertheless shall be counted as judges in regular active service.*

The En Banc Court shall be composed of all active judges of the Court. Any senior circuit judge of this circuit who sat as a member of the panel deciding the case being reviewed is eligible to participate, at his election, as a member of the En Banc court. The election of a senior judge to become a member of the En Banc Panel shall be evidenced by a letter to the chief Judge, with a copy to the Clerk.

(Amended May 19, 1985; Feb. 3, 1987.)

I.O.P.-Composition of En Banc Court-The En Banc Court is composed of all active judges of the Court. Any senior circuit judge of this circuit who sat as a member of the panel deciding the case being reviewed is eligible to participate, at his election, as a member of the En Banc Court. The election of a senior judge to become a member of the En Banc Panel shall be evidenced by a letter to the Chief Judge, with a copy to the Clerk.

Suggestion for Rehearing En Banc

Extraordinary Nature of Suggestions for Rehearing En Banc-A suggestion for rehearing en banc is an extraordinary procedure which is intended to bring to the attention of the entire Court a precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court or Fifth Circuit precedent. Alleged errors in the determination of state law, or in the facts of the case (including sufficiency of the evidence), or error asserted in the misapplication of correct precedent to the facts

of the case, are matters for *panel rehearing* but not for rehearing en banc.

The Most Abused Prerogative-Suggestions for rehearing en banc are the most abused prerogative of appellate advocates in the Fifth Circuit. While such suggestions are filed in about 15% of the cases decided, less than 1% of the cases decided by the court are reheard en banc; and frequently rehearings granted result from a request for en banc reconsideration by a judge of the Court initiated independent of any petition.

Handling of Petition by the Judges

Panel Has Control-Although a copy of the suggestion for rehearing en banc is distributed to each panel judge and every active judge of the Court, the filing of a suggestion for rehearing en banc does not take the case out of the plenary control of the panel deciding the case. A suggestion for rehearing en banc will be treated as a petition for rehearing by the panel if no petition is filed. The panel may grant rehearing without action by the full Court.

Requesting a Poll-Within 10 days of the filing of the suggestion, any active judge of the court or any member of the panel rendering the decision, desiring that the case be reheard en banc may notify the writing judge (the senior active Fifth Circuit judge if the writing judge is a non-active member) to this effect on or before the date shown on the clerk's form which transmits the suggestion. This is also notice that in the event the panel declines to grant rehearing an en banc poll is desired.

If the panel, after such notice, concludes not to grant the rehearing it notifies the Chief Judge of that fact and the Chief Judge then polls the court by written ballot on whether en banc rehearing should be granted.

Requesting a Poll on Court's Own Motion-Any active member of the Court or any member of the panel rendering the decision may request that the active members of the Court be polled on whether rehearing en banc should be granted whether or not a suggestion for rehearing en banc has been filed by a party. This is ordinarily done by a letter from the requesting judge to the chief Judge with copies to the other active judges of the Court and any other panel member.

Poll the Court-When a request to poll the Court is made, each active judge of the Court casts a form ballot and sends a copy to all other active judges of the Court and panel members. The ballot form indicates whether the judge voting desires oral argument if en banc is granted.

Negative Poll-If the vote on the poll is unfavorable to the grant of en banc consideration, the writing judge is so advised by the Chief Judge. In this event, the panel originally hearing the case then enters the appropriate order.

Affirmative Poll-If a majority of the judges in regular active service vote for en banc hearing or rehearing, the Chief Judge instructs the clerk as to the appropriate order to be entered. This order indicates that a rehearing en banc *with or without* oral argument has been granted, and specifies a briefing schedule for the filing of supplemental briefs.

Every party must then furnish to the Clerk 15 additional copies of every brief the party previously filed.

No Poll Request-If after expiration of the specified time for requesting a poll the writing judge of the panel has not received a request from any active member of the Court, the panel, without further notice, may take such action as it deems appropriate on the suggestion. However, in its order disposing of the case and the suggestion, the panel must enter an order denying suggestion for rehearing en banc showing no poll was requested by any judge.

Effect of Granting Rehearing En Banc-Unless otherwise expressly provided, the effect of granting a rehearing en banc is to vacate the previous opinion and judgment of the Court and to stay the mandate.

(Amended Nov. 1, 1988.)

47.5 Publication of Opinions

47.5.1 Criteria for Publication. *The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. However, opinions that may in any way interest persons other than the parties to a case should be published. Therefore, an opinion will be published if it:*

establishes a new rule of law, alters, or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;

applies an established rule of law to facts significantly different from those in previous published opinions applying the rule;

explains, criticizes, or reviews the history of existing decisional or enacted law;

creates or resolves a conflict of authority either within the circuit or between this circuit and another;

concerns or discusses a factual or legal issue of significant public interest;

is rendered in a case that has previously been reviewed and its merits addressed by an opinion of the United States Supreme Court.

An opinion may also be published if it:

is accompanied by a concurring or dissenting opinion;

reverses the decision below or affirms it upon different grounds.

47.5.2 Publication Decision. *An opinion shall be published unless each member of the panel deciding the case determines that its publication is neither required nor justified under the criteria for publication. The panel shall reconsider its decision not to publish an opinion upon the request of any judge of the court or any party to the case. The opinion shall then be published if, upon reconsideration, each member of the panel determines that it meets one or more of the*

criteria for publication or should be published for any other good reason.

47.5.3 Unpublished Opinions. *Unpublished opinions are precedent. However, because every opinion believed to have precedential value is published, an unpublished opinion should normally be cited only when it (1) establishes the law of the case, (2) is relied upon as a basis for res judicata or collateral estoppel, or (3) involves related facts. If an unpublished opinion is cited, a copy shall be attached to each copy of the brief.*

I.O.P.-Processing of Opinions-After the draft opinion has been prepared, the opinion writing judge circulates the proposed opinion to each of the other two judges on the panel for the purpose of obtaining their concurrence, dissent, or special concurrence. Under the Court's policy, review of another judge's proposed opinion is given high priority by the other members of the panel. When the writing judge has received concurrences from the other judges, or, in the case of dissents, or special concurrences, sufficient to constitute a majority, he then sends to the Clerk the original typewritten copy and the concurrences of both judges, and any dissent or special concurrence.

Time Schedule for Concurrence or Dissent-It is court policy that any dissent or special concurrence shall be circulated within 30 days from the date of circulation of the proposed majority opinion. If the 30 days is exceeded, the majority opinion may be filed with a notation that the right to file a further opinion is reserved.

Circulation to Non-panel Members-Because of the large number of opinions being issued annually, it is impractical for the Court to circulate among the 14 active judges and the senior judges on the Court copies of all proposed opinions. Those which initiate an express conflict with the law of another circuit are to be so circulated before the release however and are subject to polling procedures for en banc consideration should any judge request it. In other special cases, a panel or member thereof may circulate an opinion to all the members of the Court.

Non-published Opinions-The style of all non-published opinions is published in table form in the Federal Reporter. (See for example 507 F.2d 1278).

Release of Opinions-The median period for rendering an opinion after the case has been orally argued, or placed on the summary calendar is 60 days. The Clerk's Office is not given advance notice as to when a decision will be rendered and, therefore, this information is not available to counsel.

All opinions are announced by the clerk in New Orleans, and the opinions are then made available to the press and copies sent to all counsel by priority mail. On request, the Clerk will notify counsel who desires immediate collect telephonic notification.

Printed slip opinions are subject to typographical and printing errors. The cooperation of the Bar in calling apparent errors to the attention of the Clerk is solicited.
(Amended May 19, 1985; Feb. 1987.)